Supreme Court, U.S.
FILED
JAN 9 2003
OFFICE OF THE CLERK

(7)

No. 02-403

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PUBLIC CITIZEN, INC., COMMON CAUSE, DEMOCRACY 21, THE CAMPAIGN AND MEDIA LEGAL CENTER, and THE CENTER FOR RESPONSIVE POLITICS AS AMICI CURIAE IN SUPPORT OF PETITIONER

SCOTT L. NELSON
Counsel of Record
ALAN B. MORRISON
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

Attorneys for Amici Curiae

January 9, 2003

24 pp

QUESTION PRESENTED

Does 2 U.S.C. 441b, which prohibits corporations and labor unions from making direct campaign contributions in connection with federal elections, violate the First Amendment as applied to an ideological non-profit corporation?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THIS COURT'S PRECEDENTS PRECLUDE EXTENDING *MCFL* TO CORPORATE CONTRIBUTIONS 6

II. PROHIBITING *MCFL* CORPORATIONS FROM MAKING DIRECT CANDIDATE CONTRIBUTIONS IMPOSES MINIMAL BURDENS ON SPEECH AND ASSOCIATION BUT SERVES IMPORTANT GOVERNMENTAL INTERESTS 11

A. The Contribution Restriction Neither Prevents *MCFL* Corporations from Speaking in Their Own Voices Nor Bars Their Members from Contributing to Political Campaigns 12

B. Restrictions on Contributions by *MCFL* Corporations Serve the Important Interest of Preventing Circumvention of Contribution Limits and Avoiding the Appearance of Corruption 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 11, 16, 17

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

California Medical Association v. FEC, 453 U.S. 182 (1981) 6, 10, 15

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) 1, 10, 12, 13, 14

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001) 4, 6, 11, 14, 17

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 6, 8, 9, 10, 12, 14

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) ..... *passim*

FEC v. NRA, 254 F.3d 173 (D.C. Cir. 2001) 11

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 9

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 1, 4, 6, 10, 14

North Carolina Right to Life, Inc. v. Bartlett,
168 F.3d 705 (4th Cir. 1999) 16

Republican Party of Minnesota v. White,
122 S. Ct. 2528 (2002).....1

STATUTES

2 U.S.C. § 441b.....6, 11

2 U.S.C. § 441b(a) 19

MISCELLANEOUS

Campaign Notebook: More Help Than Morella Wants,
Wash. Post, Oct. 3, 2002, at B4 18

Thomas B. Edsall, *Campaign Money Finds New Conduits as Law Takes Effect; Shadow Organizations to Raise "Soft Money,"*
Wash. Post, Nov. 5, 2002, at A2.....18

Thomas B. Edsall, *New Ways to Harness Soft Money in Works; Political Groups Poised to Take Huge Donations*, Wash. Post, Aug. 25, 2002, at A1 18

Thomas B. Edsall & Juliet Eilperin, *PAC Attack II: Why Some Groups Are Learning to Love Campaign Finance Reform*, Wash. Post,
Aug. 18, 2002, at B2 18

Juliet Eilperin, *After McCain-Feingold, A Bigger Role for PACs; Groups May Be "Soft Money" Conduits*, Wash. Post, June 1, 2002, at A1 18

INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with more than 135,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption of our political processes that results when the influence of corporate money is brought to bear on the electoral system. Public Citizen has long supported campaign finance reform, through both advocacy of campaign finance legislation before Congress and involvement in litigation raising campaign finance issues and related First Amendment issues arising out of the electoral process. For example, Public Citizen filed amicus curiae briefs in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and joined in an amicus curiae brief in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"). In addition, Public Citizen has studied and reported extensively on the increasing involvement of non-profit organizations in electioneering activities, as politicians and their financial backers have sought to evade the contribution limits and reporting and disclosure requirements applicable to more traditional political organizations. Thus, Public Citizen has an intense and longstanding interest in the issues presented by this case.

Common Cause is a non-profit citizen action organization with approximately 200,000 members and supporters across the United States. Common Cause promotes, on a nonpartisan basis, its members' interest in open, honest, and ac-

---

[1] Letters of consent to the filing of this brief from both parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

countable government and political representation, and it seeks to achieve this objective by making government more responsive to citizens through government and electoral reform, including reforms of the Nation's campaign finance laws. Common Cause has participated as a party or amicus curiae in many Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws, including most of this Court's campaign finance decisions from *Buckley v. Valeo*, 424 U.S. 1 (1976), to the present.

Democracy 21 is a non-profit, non-partisan public policy organization that works to eliminate the undue influence of big money in American politics and to ensure the fairness and integrity of our democracy. Democracy 21 supports campaign finance and other political reforms. It conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented.

The Center for Responsive Politics (CRP) is a non-partisan, non-profit research group based in Washington, D.C. Founded by former Senators Frank Church (D-Idaho) and Hugh Scott (R-Pa.), it has been tracking money in politics, and its effect on elections and public policy, since 1983. CRP conducts computer-based research on campaign finance issues for the news media, academics, activists, and the public at large. CRP publishes the results of its research on its website, www.OpenSecrets.org, as well as in numerous publications made available to the public. CRP's work is aimed at creating a more educated voter, an involved citizenry, and a more responsive government. Among CRP's projects is FEC Watch, which is dedicated to ensuring enforcement of the nation's campaign finance laws in furtherance of CRP's research and analysis.

The Campaign and Media Legal Center is a non-profit organization created to act as the "people's voice" in administrative hearings and judicial proceedings involving campaign finance and media laws. The Legal Center is managed through the auspices of the University of Utah's Campaign and Media Studies Program, which was created to support and develop areas of inquiry and action on these issues through academic research, conferences, and internship programs. The heart of the Legal Center's mission is to advance a non-partisan agenda by representing the public perspective in administrative and legal proceedings interpreting and enforcing the campaign and media laws. The Legal Center seeks to play an active role in generating legal and policy debate about disclosure, soft money, issue advocacy, and contribution limits by participating in FEC rulemaking and enforcement proceedings as well as cases addressing campaign finance issues in federal and state courts.

As non-profit groups themselves, the amici curiae who join in this brief are also keenly aware of—and sensitive to—the First Amendment interests of the types of organizations that this case concerns. Nonetheless, amici curiae do not believe that the ability to make corporate contributions to candidates for electoral office is essential to the exercise of the First Amendment rights of such organizations or their members. And amici curiae are deeply concerned that opening the door to campaign contributions by non-profit corporations—especially those that do not disavow acceptance of corporate cash—will lead to circumvention of limits on campaign contributions that have long been sustained by this Court and will threaten to bring about the corruption of the electoral process that those limits are designed to prevent. Amici curiae therefore submit this brief urging reversal of the Fourth Circuit's decision in this case.

SUMMARY OF ARGUMENT

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), this Court held that the Federal Elec-

tion Campaign Act ("FECA") could not constitutionally be applied to prohibit certain non-profit corporations from expending funds to engage in their own political speech advocating the election of candidates for federal office. The question posed by this case is whether, for the first time, the protection afforded independent political *expenditures* by *MCFL* is to be extended to permit corporations to make *contributions* directly to candidates for political office.

This Court's campaign finance jurisprudence has, from its beginnings, extended significantly less protection to campaign contributions than to expenditures by individuals or organizations needed to support their own speech. *See Buckley v. Valeo*, 424 U.S. at 20-21; *Nixon v. Shrink Missouri PAC*, 528 U.S. at 385-89; *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 446, 456, 464 (2001) ("*Colorado II*"). Campaign contributions by corporations (even non-profit corporations) and labor unions have long been banned outright, and this Court has recognized that the ban serves the compelling purpose of preventing corruption. *FEC v. National Right to Work Committee*, 459 U.S. 197, 208-10 (1982) ("*NRWC*").

Indeed, in *NRWC*, the Court unanimously held that even a non-profit, ideological membership corporation could be prevented from soliciting funds to be used for campaign contributions unless it complied with the requirements for establishing a separate segregated fund under FECA. When the Court later held in *MCFL* that such organizations could not be prevented from engaging in independent *expenditures*, it expressly distinguished the *contribution* restrictions upheld in *NRWC*. Thus, in holding that *MCFL* requires that non-profit ideological corporations be permitted to make campaign contributions, the Fourth Circuit in this case had to disregard what this Court said not only in *NRWC*, but also in *MCFL* itself.

There is no reason for this Court to reconsider these settled principles. The prohibition on direct corporate contributions to candidates burdens the First Amendment rights of non-profit organizations and their members only minimally, if at all. It leaves the organizations free to engage directly in protected speech to the full extent permitted by *MCFL*, and it permits their members to contribute directly to whatever candidates they choose (subject to the limits sustained in *Buckley*) or to contribute through a separate segregated fund or "PAC" established by the non-profit corporation under the provisions sustained in *NRWC*. In contrast to its modest impact on First Amendment values, the prohibition on corporate contributions advances the important interest in preventing non-profit organizations from being used as conduits to circumvent the contribution limits upheld in *Buckley*, undermining their goal of standing as a bulwark against corruption. Permitting *MCFL* corporations to make candidate contributions would effectively allow them to take on many of the functions of a PAC entirely free from the contribution limits and other restrictions that FECA imposes on PACs—and that this Court has sustained in previous cases.

For these reasons, the Court should follow its precedents that require reversal of the Fourth Circuit's decision on the discrete issue presented by this case. The Court has not been invited by the parties to reexamine the validity of those precedents in this case, and there is no occasion for doing so. To be sure, broader and more fundamental questions of campaign finance law will soon come before this Court with the inevitable appeals from the three-judge district court that is currently hearing challenges to the Bipartisan Campaign Reform Act of 2002. The narrow issue posed by this case, however, can be decided without prejudging or pretermitting consideration of the many issues the Court will be called upon to resolve concerning the new legislation. The Court need only rely on settled principles to sustain the constitutionality of applying the longstanding prohibition on corporate campaign contributions to the non-profit corporation involved in this case.

ARGUMENT

I. THIS COURT'S PRECEDENTS PRECLUDE EXTENDING *MCFL* TO CORPORATE CONTRIBUTIONS.

In *Buckley v. Valeo*, this Court held that limits on campaign contributions "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20. In the years since then, the Court has regularly relied on this aspect of *Buckley* to sustain limits on campaign contributions (and their functional equivalent, coordinated campaign expenditures), even when limits on independent expenditures have been struck down. *See, e.g.*, *Colorado II*, 533 U.S. at 440-43; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 385-89; *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) ("*NCPAC*"); *California Medical Association v. FEC*, 453 U.S. 182, 196-98 (1981) (plurality opinion). In *Shrink Missouri*, the Court expressly held that, under *Buckley*, laws restricting campaign contributions are subject to a standard of First Amendment review significantly less stringent than the strict scrutiny applicable to direct restraints on speech and association. 528 U.S. at 386-89.

Buckley itself neither directly addressed nor called into question the longstanding federal statutory provisions (now incorporated into FECA and found in 2 U.S.C. § 441b) that prohibit corporations and labor unions from using funds in their general treasuries to make contributions to candidates for federal office. In *NRWC*, however, the Court directly considered—and upheld—the application of those provisions to a non-profit corporation organized to pursue ideological purposes.

The non-profit corporation in *NRWC* had established a "separate segregated fund" for the purpose of making contributions to candidates that the corporation itself was prohibited from making under 2 U.S.C. § 441b. Under FECA, the organization could not contribute its own funds to the separate segregated fund, and could only solicit contributions to the fund from "members." The issue in *NRWC* was whether it violated the First Amendment rights of a non-profit corporation (and its members) to prevent the organization from soliciting funds from non-members to use for making campaign contributions.

In a unanimous decision by then-Justice Rehnquist (indeed, the only decision in the Court's campaign finance jurisprudence from *Buckley* on that generated no separate opinions), the Court sustained the limitation against the First Amendment challenge, holding that the rights asserted by the challengers were "overborne by the interests Congress has sought to protect in enacting § 441b." 459 U.S. at 207. The Court identified two such interests: the need "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions," *id.*; and the need "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 208.

The Court held that these purposes were "sufficient to justify" § 441b, *id.*, even as applied to an ideologically driven non-profit organization "without great financial resources." *Id.* at 210. The Court explicitly "accept[ed] Congress's judgment that it is the potential for [corporate] influence that demands regulation," and refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* Thus, the Court held, "there is no reason" that the interest in preventing corruption "may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.* at 210-11.

Although the precise issue before the Court in *NRWC* was the constitutionality of the provision forbidding solicitation of contributions to the separate segregated fund from non-members of the organization, the Court's decision necessarily also sustained the basic prohibition on the use of the non-profit corporation's own funds for contributions. Indeed, if (as the Fourth Circuit held in this case) the corporation had a constitutional entitlement to make candidate contributions using its own general funds—solicited from members and non-members alike—it would be pointless to have held that it could be limited to soliciting members for the separate segregated fund. Thus, the Court's constitutional analysis in *NRWC* logically presupposed the constitutionality of the basic prohibition on the use of corporate funds for contributions to candidates.

The Court recognized this very point two Terms later in *NCPAC*. There, even while holding that a political action committee—a PAC—had a First Amendment right to engage in *expenditures* for its own political speech that exceeded limits Congress sought to impose by statute, the Court distinguished its treatment of corporate *contributions* in *NRWC*:

> [*NRWC*] turned on the special treatment historically accorded corporations. In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals. ... We held in *NRWC* that a rather intricate provision of the FECA dealing with the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. The prohibition excepted corporate solicitation of contributions to a segregated fund established for the purpose of contributing to candidates, but in turn limited such solicitations to stockholders or members of a corporation without capital stock. We upheld this limitation on solicitation of contributions as applied to the National Right to Work Committee, a corporation without capital stock, *in view of the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office. NRWC* is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.

NCPAC, 470 U.S. at 495-96 (citing *NRWC* and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978)) (emphasis added).

NCPAC went on to reaffirm *Buckley*'s holding that there is "a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Id.* at 497. Thus, even while holding that the statutory limits on PAC independent expenditures were unconstitutional, the Court reiterated that "[i]n *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." *Id.* at 500.

The Court's holding two years later in *MCFL* was fully consistent with the principle—established in *NRWC* and reaffirmed in *NCPAC*—that a non-profit corporation may be prohibited from making candidate contributions except through a separate segregated fund made up of contributions solicited from members for electioneering purposes. In *MCFL*, the Court held that such an organization could not be prohibited from spending its funds on its own independent election-related political speech, but the Court emphasized that *candidate contributions* were a different matter:

> *National Right to Work Committee* does not support the inclusion of MCFL within § 441b's prohibition on

direct independent spending. That case upheld the application to a nonprofit corporation of a different provision of § 441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates. 459 U.S., at 200. We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. *NCPAC*, 470 U.S. 480 (1985); *California Medical Assn. v. FEC*, 453 U.S. 182, 194, 196-197 (1981); *Buckley*, *supra*, at 20-22.

In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions to candidates.

MCFL, 479 U.S. at 259-60; *see also id.* at 261-62 ("As we have noted above, however, the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures.").

In short, *NRWC* held that it is constitutional to require an ideological non-profit corporation that wishes to make contributions to political candidates to use a separate segregated fund, with contributions solicited only from members, and nothing in *MCFL*'s discussion of independent *expenditures* suggested any retreat from that holding with respect to *contributions*. Nor do any of this Court's subsequent rulings call into question the prohibition on direct corporate contributions to candidates. Indeed, those decisions only underscore the general legitimacy of restrictions on campaign contributions. *See, e.g., Nixon v. Shrink Missouri PAC*, 528 U.S. at 395-96; *compare Colorado I*, 518 U.S. at 615 (opinion of Breyer, J.) (rejecting limits on independent expenditures by political parties), *with Colorado II*, 533 U.S. at 447 (sustaining limits on contributions and coordinated expenditures by political parties). This Court's precedents thus provide no support for—and, indeed, rule out—the Fourth Circuit's extension of *MCFL* to candidate contributions.

II. PROHIBITING *MCFL* CORPORATIONS FROM MAKING DIRECT CANDIDATE CONTRIBUTIONS IMPOSES MINIMAL BURDENS ON SPEECH AND ASSOCIATION BUT SERVES IMPORTANT GOVERNMENTAL INTERESTS.

Even if controlling precedents of this Court did not clearly establish the constitutionality of applying the contribution restrictions of 2 U.S.C.§ 441b to non-profit ideological organizations, reversal of the Fourth Circuit's decision would still be necessary in light of the insubstantial burdens that those restrictions impose on First Amendment interests and the important interests the restrictions serve. The application of 2 U.S.C. § 441b to "*MCFL* corporations" does not significantly limit the ability of such corporations and their members to participate in political speech and association.[2] On the other hand, the restriction is necessary to prevent cir-

[2] We use the term "*MCFL* corporations" to refer to ideological non-profit corporations whose independent expenditures qualify for constitutional protection under *MCFL*. The precise boundaries of this category are unclear, and some courts of appeals—particularly the Fourth Circuit in this case—have defined *MCFL* corporations more expansively than did this Court in *MCFL* itself (*see* 479 U.S. at 263-64) and in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 661-65 (1990). Nonetheless, the Solicitor General's Petition for Certiorari in this case did not challenge the Fourth Circuit's holding that respondent North Carolina Right to Life, Inc., qualifies as an *MCFL* corporation even though it has accepted more than *de minimis* contributions from for-profit corporations. *Cf. FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001) (organization that accepts more than *de minimis* corporate contributions does not qualify under *MCFL*). We do not agree with the ruling of the Fourth Circuit, but do not contest it here since the issue was not presented in the Petition.

cumvention of the limits on candidate and PAC contributions that this Court has repeatedly sustained, and it thus plays an important role in preventing corruption of the electoral process.

A. The Contribution Restriction Neither Prevents *MCFL* Corporations from Speaking in Their Own Voices Nor Bars Their Members from Contributing to Political Campaigns.

Buckley upheld FECA's contribution limits because they involved "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20. To be sure, *Buckley* involved a contribution limit while this case involves a prohibition on contributions (except through separate segregated funds), but the law's effect on the First Amendment interests of *MCFL* corporations and their supporters remains insubstantial.

To begin with, regardless of the prohibition on direct contributions to candidates, corporations that fall within the protection of *MCFL* retain the unfettered ability to speak out as much as they desire in support of or opposition to candidates for federal office by making independent expenditures for those purposes. *See MCFL*, 479 U.S. at 263. The contribution restriction does not prevent such corporations from saying whatever they wish about candidates—even if saying it costs money. Thus, *MCFL* corporations retain their ability to engage in what the Court has characterized as "'core' First Amendment activity." *Colorado I*, 518 U.S. at 616 (opinion of Breyer, J.).

Similarly, the ability of an *MCFL* corporation to engage in its own independent expenditures gives full scope to its supporters' right to engage in "collective action in pooling their resources to amplify their voices." *NCPAC*, 470 U.S. at 495. Thus, the interest of individuals in joining together to engage in political speech that they could not individually afford is not affected by prohibiting *MCFL* corporations from

making contributions, as opposed to independent expenditures. Unlike the expenditure restrictions struck down in *Buckley* and *MCFL*, the contribution restrictions at issue here do nothing to "preclud[e] … associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection for the freedom of association." *Buckley*, 424 U.S. at 22.

Moreover, to the extent the members or supporters of an *MCFL* corporation wish to associate themselves symbolically with a candidate by giving money to his campaign (as opposed to pooling their resources to engage in independent speech), they remain free to make their own individual contributions to the candidate, subject to FECA limits. *See id.* at 21.[3] From the standpoint of their usefulness in funding the candidate's campaign activities, such individual contributions are just as effective as contributions flowing through the conduit of an *MCFL* corporation: One thousand separate contributions of $1 each from individual members of an *MCFL* corporation provide just as much support to the candidate as one contribution of $1000 funneled through the *MCFL* corporation. Indeed, the only respect in which pooled contributions could be said to be more "effective" than individual ones is that the pooled contributions would have more of a tendency to make the candidate beholden to the influence of an identified special interest group. But that is precisely the evil of corruption (or its appearance) that Congress is entitled to combat through restrictions on campaign contributions. *See Buckley*, 424 U.S. at 26-28; *NRWC*, 459 U.S. at 208;

---

[3] The First Amendment rights of an ideological, non-profit membership corporation are largely derivative of the rights of its members, *Colorado II*, 533 U.S. at 448 n.10. Therefore, if the rights of the members to make contributions are not infringed, as *Buckley* holds, the non-profit corporation has no greater rights that require vindication, contrary to what respondent suggests here.

NCPAC, 470 U.S. at 497; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 390-91.

Finally, to the extent the members of an *MCFL* corporation may have a legitimate, constitutionally protected interest in being able to provide pooled contributions to a candidate, the law provides a mechanism for such contributions: They can be made through a separate segregated fund, or PAC, established by the corporation, which can use unlimited treasury funds to raise money for the PAC and administer it. Although this Court held in *MCFL* that the ability to *speak* through a PAC was not an adequate substitute for the corporation's own ability to engage in core political speech directly, the lesser interest in making *contributions* is not infringed by the requirements that attach to creation and operation of a separate segregated fund. Indeed, that is precisely the holding of *NRWC*. *See also Austin*, 494 U.S. at 660-61.

B. Restrictions on Contributions by *MCFL* Corporations Serve the Important Interest of Preventing Circumvention of Contribution Limits and Avoiding the Appearance of Corruption.

Invalidation of the prohibition on contributions to candidates by *MCFL* corporations would permit such non-profit corporations to become conduits for funneling cash to candidates in ways that would evade and undermine provisions of FECA previously upheld by this Court.[4] In particular, permitting such contributions would allow circumvention of the individual per-candidate and aggregate contribution limits whose validity the Court affirmed in *Buckley v. Valeo*, 424 U.S. at 23-35, 38. Because contributions to non-profit advocacy corporations are unlimited, a contributor who had reached either the per-candidate or aggregate limits for a particular election cycle, but who desired to provide further direct support for a candidate or candidates, could do so by making unlimited contributions to a non-profit corporation that intended to (or was likely to) contribute to the contributor's favored candidates, within the limits of the law, which are now $2000 per candidate for both a primary and a general election.

[4] *See Colorado II*, 533 U.S. at 457-65 (recognizing importance of government's interest in preventing evasion of campaign finance laws.)

In addition, allowing *MCFL* corporations to make candidate contributions would lead directly to circumvention of the limits on contributions to PACs and other political committees upheld in *California Medical Association v. FEC*, 453 U.S. 182. There, the Court recognized the important role that the limits on contributions to PACs play in preventing circumvention of individual contribution limits: without those limits, "an individual or association seeking to evade the … limit on contributions to candidates could do so by channelling funds through a multicandidate political committee." *Id.* at 198 (plurality opinion). Thus, the limits on contributions to PACs are "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*." *Id.* at 199.[5]

Permitting *MCFL* corporations to become conduits for contributions to candidates would effectively allow them to operate as mini-PACs.[6] That would subvert the limits on PAC contributions upheld in *California Medical Association*

[5] Justice Blackmun's concurring opinion in *California Medical Association* similarly emphasized that, to the extent political committees make contributions (as opposed to independent expenditures), they are "essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption" justifying the limits on the amounts that may be contributed to them. *Id.* at 203 (Blackmun, J., concurring in part and in the judgment).

[6] The principal difference would be that *MCFL* corporations would be subject to the $2000 per-candidate contribution limit applicable to individuals rather than the $5000 limit applicable for PACs, since FECA does not provide an exception for them from the general $2000 limit as it does for PACs.

because contributions to non-profit advocacy groups, unlike contributions to political committees, are not subject to any limitations. Moreover, *MCFL* corporations would operate free of the source limitations and disclosure requirements applicable to political committees.

Perhaps most disturbing of all, permitting *MCFL* corporations to make contributions to candidates would cause a breach in the dike that that has long prevented for-profit corporations and labor unions from directly or indirectly making contributions to candidates for federal office.[7] The Fourth Circuit has held in this case and in a previous case involving the same organization (*North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999)), that an organization may qualify as an *MCFL* corporation even if, unlike the organization in *MCFL*, it does not disavow contributions from for-profit corporations, as long as such contributions constitute only a "modest percentage" of its revenue. *Id.* at 714. Under the Fourth Circuit's reading of *MCFL*, a for-profit corporation or labor union may make substantial contributions to a non-profit corporation in the expectation that funds will be passed along to candidates, as long as the non-profit corporation has a large enough budget that the corporate or union contribution represents only a "modest percentage" of the non-profit's funding.[8] Since the Fourth Circuit and some

[7] In light of *NRWC* and *Austin v. Michigan Chamber of Commerce*, the constitutionality of prohibiting for-profit corporations from making candidate contributions is clear. Indeed, *Austin* held that such corporations may be prohibited even from making independent expenditures supporting candidates. Moreover, *Austin* approvingly noted that for-profit corporations may be prohibited from contributing their own funds to PACs (*see* 494 U.S. at 664 n.3), a limitation that would be rendered irrelevant under the Fourth Circuit's expansion of *MCFL*.

[8] As noted above, the Solicitor General has chosen not to challenge the Fourth Circuit's holding that an *MCFL* corporation may accept funding from for-profit corporations. That holding is, to say the least, not unassailable. *See* Brief Amicus Curiae of the Brennan Center for Justice. As long as the Fourth Circuit's interpretation of *MCFL* on this point remains

(*Footnote continued*)

other courts allow an *MCFL* corporation to receive some money from for-profit corporations, the potential exists for evading the ban on contributions by for-profit corporations and undermining the interests that the ban serves. *See MCFL*, 459 U.S. at 207-10; *Austin*, 494 U.S. at 658-61.

Because candidate contributions by corporations have long been prohibited and the lower courts' rulings in this case are the first ever to hold that any corporation has a right to make them, there is no body of experience that directly demonstrates the practical effect that permitting such contributions can be expected to have. "Since there is no recent experience" with such contributions, "the question is whether experience under the present law confirms a serious threat of abuse" if they are permitted. *Colorado II*, 533 U.S. at 457. Here, as in *Colorado II*, "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced"—in this case by opening the door to contributions by *MCFL* corporations. *Id.*

Experience under existing laws shows that non-profit organizations are increasingly pushing the limits of permissible electioneering activities. For example, amicus curiae Public Citizen has documented how one non-profit, United Seniors Association, has used millions of dollars of corporate backing to fund "issue advertisements" that stop just short of express advocacy in support of candidates favored by the

standing, however, the potential that a non-profit corporation's candidate contributions may be conduits for the cash of for-profit corporations must be considered in assessing the possible impact of allowing *MCFL* corporations to make candidate contributions.

pharmaceutical industry.[9] Other examples of non-profits funneling corporate monies into electioneering activities abounded in the recent congressional elections.[10]

Prohibitions on "soft money" contributions to the national parties in the new Bipartisan Campaign Reform Act have escalated the trend, as the flow of money has been diverted from the parties to other organizations, including not only PACs but also non-profit advocacy organizations that engage in election-related expenditures and that are not covered by the 2002 Act.[11] These developments leave no room for doubt that if a loophole is opened allowing ideological non-profit corporations to contribute directly to candidates, the money will follow.

CONCLUSION

Broader issues in the field of campaign finance reform await this Court in the case testing the many provisions of the Bipartisan Campaign Reform Act. This case, however, does

---

[9] Public Citizen's reports can be found on its website at http://www.citizen.org/congress/campaign/special_interest/articles.cfm?ID=7999 and http://www.citizen.org/documents/usaupdate.pdf.

[10] *See, e.g., Campaign Notebook: More Help Than Morella Wants*, Wash. Post, Oct. 3, 2002, at B4 ("A nonprofit group funded in part by the pharmaceutical industry is urging voters in Maryland's 8th Congressional District to call Rep. Constance A. Morella and thank the Republican for voting for the industry-backed GOP plan to make prescription drugs more available to seniors."); *see also* http://www.citizen.org/congress/articles.cfm?ID=8495 (Public Citizen report documenting campaign expenditures of and contributions to non-profit "527 groups").

[11] *See* Thomas B. Edsall, *Campaign Money Finds New Conduits as Law Takes Effect; Shadow Organizations to Raise "Soft Money,"* Wash. Post, Nov. 5, 2002, at A2; Thomas B. Edsall, *New Ways to Harness Soft Money in Works; Political Groups Poised to Take Huge Donations*, Wash. Post, Aug. 25, 2002, at A1; Thomas B. Edsall & Juliet Eilperin, *PAC Attack II: Why Some Groups Are Learning to Love Campaign Finance Reform*, Wash. Post, Aug. 18, 2002, at B2; Juliet Eilperin, *After McCain-Feingold, A Bigger Role for PACs; Groups May Be "Soft Money" Conduits*, Wash. Post, June 1, 2002, at A1.

not raise those issues, nor is there any reason for the Court to use this case to rethink its campaign finance jurisprudence from first principles. Rather, the narrow but important issue posed by this case can be resolved on the basis of thirty years of settled law dictating that the judgment of the Fourth Circuit be reversed.

For the foregoing reasons, the Fourth Circuit's judgment that 2 U.S.C. § 441b(a)'s prohibition on corporate campaign contributions may not be enforced against respondent North Carolina Right to Life, Inc., should be reversed.

Respectfully submitted,

Scott L. Nelson
Counsel of Record
Alan B. Morrison
David C. Vladeck
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Amici Curiae

Date: January 9, 2003